A **SIN HOCK SOON TRANSPORT SDN BHD & ANOR**

v.

LOW KING BAN

B HIGH COURT MALAYA, TAIPING
ZAKARIA SAM J
[CIVIL APPEAL NO: 12-26-2004]

DAMAGES: *Personal injuries - Special damages - Whether respondent*
C *entitled to RM37,744.20, monies paid by insurance company - 'Out of pocket' expenses - Interpretation of - Civil Law Act 1956, s. 28A(1)(a)*

The appellants filed this appeal against the decision of the sessions court judge in respect of the sum of RM37,744.20 awarded to the
D respondent. The respondent was involved in an accident and was treated for his injuries at the Ipoh Specialist Centre. The respondent had incurred a bill of RM38,878 pertaining to his medical treatment. From this sum, the amount of RM37,744.20 was paid by the respondent's insurance company where he had
E taken out a policy covering for the injuries he had sustained. It was the appellants' contention that the respondent was not entitled to RM37,744.20 as the monies were paid by his insurance company. According to the appellant, the respondent did not pay this sum 'out of his own pocket.' The respondent, however,
F submitted that the interpretation placed by the appellant on the phrase 'out of pocket expenses' was too restrictive and not accurate and that nursing care (an item of special damages) could be claimed by family members or relatives of the respondent without the respondent actually paying anything 'out of his
G pocket.' The respondent then referred to s. 28A(1)(a) of the Civil Law Act 1956 and emphasised that the wordings of s. 28(A)(1)(a) clearly stipulates that any monies received under any contract of assurance or insurance cannot be deducted when assessing damages.

H **Held (dismissing the appeal):**

[1] The respondent himself purchased the insurance policy and paid for the premiums. By applying the principles as enunciated in *Frank Astle Ward v. Malaysian Airlines System*
I *Bhd,* the respondent was entitled to the insurance monies paid under his own cover of insurance and also the special damages awarded by way of his claim against the appellants. The

respondent should not be penalised for his prudence and foresight in taking out an insurance policy to protect his life, permanent disability or medical expenses as a result of an accident. (paras 17 & 18)

[2] Section 28A(1)(a) of the Civil Law Act 1956 made it clear that any sum paid or payable in respect of a personal injury which does not result in death under any contract of assurance or insurance shall not be taken into account in assessing damages. The words special damages must not be restricted only to monies paid out of the pocket of the respondent.There was no merit whatsoever on the narrow interpretation urged by the appellants on the words 'out of pocket' expenses under the head of special damages. (paras 22, 23 & 24)

Case(s) referred to:

Frank Astle Ward v. Malaysian Airlines System Bhd [1991] 3 MLJ 317 ***(refd)***

Judd v. Board of Governors of the Hammersmith, West London and St Mark's Hospitals & Anor [1960] 1 All ER 607 ***(refd)***

Khairul Sham Ahmad & ANor v. Yesudass Michaelsamy [2005] 2 CLJ 195 HC ***(not foll)***

Lee Thiam v. Fatimah Salleh [1981] 1 MLJ 285 ***(refd)***

Liew Thai v. Chai Yee Chong [1997] 1 CLJ Supp 13 ***(refd)***

Marappan & Anor v. Siti Rahmah Ibrahim [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174 SC ***(refd)***

Pang Ah Chee v. Chong Kwee Sang [1985] 2 CLJ 221; [1985] CLJ (Rep) 236 FC ***(refd)***

Sam Wun Hoong v. Kader Ibramshah [1981] 1 MLJ 295 ***(refd)***

Tai Siat Fah & Ors v. Lawful Personal Representative of Badrul Hisham Hashim [1995] 2 CLJ 649 HC ***(refd)***

Tan Kuan Yau v. Suhindrimani [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***

Topaiwah v. Salleh [1968] 1 MLJ 284 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 28A(1)(a)

Employee's Social Security Act 1969, s. 42

For the appellants/defendant - Hammad Faesol Zuhad; M/s CK Leong & Co
For the respondent/plaintiff - Kirenjit Kaur; M/s Gurdev Dalgit, Su & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Zakaria Sam J:

[1] The appellant filed this appeal against the decision of the learned sessions judge, essentially, in respect of only one issue as set out in ground 5 of the memorandum of appeal which I have taken the liberty to reproduce as follows:

> Yang Arif Tuan Hakim telah tersilap dari segi undang-undang dan fakta apabila mengawadkan gantirugi khas untuk kos perubatan Hospital Swasta sebanyak RM37,744.20 kepada responden/plaintif walaupun jumlah tersebut telah dibayar sepenuhnya oleh pihak insuran responden/plaintif.

[2] After having heard both the counsels for the appellants and respondent, I have dismissed the appeal with cost and here are the grounds of my decision.

Facts

[3] On 30 June 2001 at about 3.40pm the respondent was riding a motorcycle No. ADH 7174 and he was involved in an accident with a motor lorry trailer No. WDM 3827 at the junction of Jalan Ipoh/Kuala Kangsar-Lintang and Sg. Siput Utara. As a result of the said accident, the respondent was injured and consequently treated for his injuries at the Ipoh Specialist Centre, Ipoh.

[4] In the lower court, it was not disputed that the respondent had incurred a bill of RM38,878 pertaining to his medical treatment at the Ipoh Specialist Centre, Ipoh. From this sum, the amount of RM37,744.20 was paid by the respondent's insurance company where he had taken out a policy covering for the injuries that he had sustained.

Judgment Of The Lower Court

[5] In view of the fact that this appeal is confined only to one issue as I have mentioned earlier, it is useful at this juncture to set out the relevant part of the judgment of the learned sessions judge upon which the appellants would like this court to reverse.

(e) Kos perubatan

Jumlah RM38,876.60 telah disetujui. Yang dipertikai ialah sejumlah RM37,744.20 darinya telah dibayar oleh insuran diri plaintif sendiri – Isunya sama ada jumlah ini boleh dituntut dari defendan. Mahkamah berpendapat ianya boleh dituntut dari defendan kerana s. 28A Akta Undang-Undang Sivil 1956 memperuntukkan seperti berikut:

28A. Damages in respect of personal injury.

(1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account:

(a) Any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;

(b) any pension or gratuity, which has been or will or may be paid as a result of the personal injury; or

(c) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever in respect of the personal injury.

Pengarang Winfield and Jolowicz on Tort 11th Edition di muka surat 616 mencatatkan:

Thus charitable payments are not taken into account for the simple reason that otherwise there would be a risk that the springs of charity would dry up, nor will the courts make a deduction in respect of the proceeds of insurance, largely it seems, because it is felt that the plaintiff should not be penalized for his own foresight and thrift. Wages or sick pay paid by an employer as a matter of contractual obligation clearly to reduce the plaintiff's loss are therefore deductible, unless made on condition of repayment in the event of a successful claim for damages.

Prinsip inilah yang diterima pemakaiannya di Malaysia melalui peruntukkan s. 28A tadi dan kes Mahkamah Agong *Frank Astle Ward v. Malaysia Airlines System Bhd* [1991] 1 MLJ 317 telah mengesahkannya.

Oleh itu plaintif berhak menuntut keseluruhan jumlah tersebut dari defendan.

Appellants' Contentions

[6] The learned counsel for the appellants contended that the respondent is not entitled to the sum of RM37,744.20 as the monies were paid by his insurance company. The respondent did not pay this sum of RM37,744.20 'out of his own pocket'. In support thereto, this court was referred to the case of *Sam Wun Hoong v. Kader Ibramshah* [1981] 1 MLJ 295 wherein it was held that:

> In an action for personal injuries, there are two classes of damages which have to be considered – special damages which has to be specially pleaded and general damages which need not be specially pleaded. In both classes of damages the burden of proof based on the balance of probabilities in the evidence lies on the plaintiff. Special damages consists of out of pocket expenses, such as hospital bills and actual loss of earnings during period of total incapacity, and is generally capable of substantially exact calculation.

[7] The learned counsel for the appellants proceeded to explain that if at all any sum is to be awarded, the respondent is only entitled to the premium paid for the insurance cover/and or loss of non claim bonus ('NCB').

[8] By way of analogy, the learned counsel for the appellants illustrated with the example of a person who has a comprehensive policy of insurance (taken out as required by the Road Traffic Act 1976) in respect of his motor vehicle. In the event the said vehicle is damaged, the bill for repairs would be paid by his insurance company and all that the person is entitled to claim is the loss of his NCB and not for costs of repairs.

The Respondent's Reply

[9] The learned counsel for the respondent submitted that the interpretation placed by the counsel for the appellants on the phrase 'out of pocket expenses' was actually too restrictive and not accurate. She contended that nursing care (which is an item of special damages) can be claimed by family members or relatives of the respondent without the respondent actually paying anything "out of his pocket".

[10] The learned counsel then referred to s. 28A(1)(a) of the Civil Law Act 1956 and emphasised that the wordings of s. 28A(1)(a) clearly stipulates that any monies received under any

contract of assurance or insurance cannot be deducted when assessing damages. She went on to explain that if a person is prudent enough to take out an insurance policy to protect against personal injury, permanent disability or for that matter his life, the policy holder should not be penalized for his own foresight.

[11] In reply to the appellants' submission that a person cannot claim for repair but only for the loss of NCB, the learned counsel for the respondent commented on the different basis for a claim under property insurance where the claim is premised on an indemnity basis whereas life and personal accident insurance is not. Finally, she submitted that s. 28A(1)(a) deals with personal injury and not damage to property.

Decision Of This Court

[12] In order for me to reverse the decision of the learned sessions judge, the appellants must show that the trial court had misdirected itself on points of law or that the award was entirely erroneous. Unless I am so convinced, it is the duty of the appellate court to uphold the decision of the lower court as appeal to a higher tribunal or court starts with the premise that it is correct in all respect unless it can be shown otherwise. The principle upon which an appellate court will interfere with the lower court's decision is well settled and I have in coming to my decision in the instant case kept the under mentioned authorities in mind:

1) *Topaiwah v. Salleh* [1968] 1 MLJ 284 (FC)

2) *Lee Thiam v. Fatimah binte Salleh* [1981] 1 MLJ 285 (FC)

3) *Pang Ah Chee v. Chong Kwee Sang* [1985] 2 CLJ 221; [1985] CLJ (Rep) 236 (FC)

4) *Tan Kuan Yau v. Suhindrimani* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 (FC)

[13] In the instant case, there is clearly no dispute that there was a valid policy of insurance subsisting at the material time and under this policy of insurance the respondent was duly compensated for his medical bills by the insurance company that issued the cover of insurance.

[14] In the case of *Frank Astle Ward v. Malaysian Airlines System Bhd* [1991] 3 MLJ 317, a decision of the then Supreme Court where the issue involved is more or less similar to this appeal, Mohamed Azmi SCJ had this to say at p. 320:

> On the issue of deductibility under the second head s. 28A(1)(a) the Civil Law Act 1956 provides:
>
> (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account:
>
> (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;
>
> Mr. RK Nathan, in his argument, urges this court not to limit the interpretation of this provision to insurance policies the premiums of which are paid by the injured person. On behalf of the respondents, it seems to be suggested that English authorities would only exclude deductibility in cases where the premiums are paid for by the injured person. Thus, in *Bradburn v. Great Western Railway Co* which was considered in *Parry v. Clever*, it was held that in an action for injuries by the defendant's negligence, a sum received by the plaintiff on an accident insurance policy (which he had paid for) cannot be taken into account in deduction of damages.
>
> In ordering the deduction, the learned judge relied principally on the House of Lords case of *Hussain v. New Taplow Paper Mills Ltd and Nabi v. British Leyland (UK) Ltd.* It would appear that, on the question of deductibility, His Lordship applied the simple test of who paid for the premiums of the insurance policy. We regret to say that the law in English on deductibility is not that simple. In fact, there the law on this subject is so unsettled that Parliament has intervened with a compromise solution by providing in some instances that half of a certain payment, over a period, can be deducted in assessing the loss, for example, s. 2 of the Law Reform (Personal Injuries) Act 1948. But this type of solution is not open to any court where the statute is silent. The guiding principle governing decision in border line situations is that 'The common law had treated this matter as one depending on justice, reasonableness and public policy' per Lord Reid in *Parry v. Cleaver* at p 13).

[15] His Lordship further observed:

> What are the facts in the present appeal? As can be observed, even under the common law it is necessary to consider the nature of the benefits paid or payable under the insurance policy to determine, *inter alia*, whether the money received by the appellant is under a purely personal insurance policy or byway of benefit arising out of his employment. Consideration should also be given to whether the benefit is analogous to wages or to pension. It is not in dispute that under the terms of the contract of employment between MAS and the appellant, the former are obliged to take out personal insurance policy to cover all their pilots and certain other category of employees in case of death or permanent disablement. The insurance money is payable by the insurers direct to the injured pilot irrespective of negligence on the part of anyone, or whether the fatal or permanent injury is caused by riots, civil commotion or war risks.

[16] At p. 321 it was further explained that:

> The benefits payable under the policy in this appeal are obviously not intended to reimburse MAS of payments made by them to their employees under the terms and conditions of the contract of employment. In our opinion, the insurance cover is a service benefit contractually granted by MAS to their pilots on termination of their services arising from death or permanent disability. It is analogous to pension or gratuity and therefore should not be deducted. To be deductible, the contractual payment should be analogous to wages such as 'sick pay' in Hussain's case or statutory unemployment benefits as in Nabi's case. Here, the insurance payment cannot possibly be treated as if MAS continued to pay part of the appellant's wages after the accident to support the argument against double payment. The loss of earnings, past and future, that the appellant is entitled under the Civil Law Act 1956, which is caused by the negligence of MAS, should not be diminished by such contractual benefits which are analogous to lump sum pension or gratuity even under the common law. Further, although MAS is paying the premium under the contract of employment, the appellant's services given under it form the reward (equivalent to a premium) which entitles him to the benefit. As alluded to earlier, it is a form of lump sum pension or gratuity payable in the event of his death or permanent disability when employment has ceased.
>
> To put the issue of deductibility beyond doubt in the present appeal, our Parliament has, fortunately for the appellant, introduced s. 28A(1)(a). By Act A308 which came into force on 30 May 1975. The intervention of the new provision goes beyond introducing mere compromise solution against deductibility. We

A agree with Mr. RK Nathan that the plain meaning of the words used in that section should be adopted for the purpose of interpretation. Adopting the strict rule of interpretation, our Parliament in its wisdom has made it crystal clear that any sum paid or payable in respect of personal injury which does not result
B in death 'under any contract of assurance or insurance' shall not be taken into account in assessing damages. By providing no exception, the effect would be to eliminate altogether deductibility even in border line situations although the injured person has not directly contributed to the insurance scheme.

C For the above reasons, it is our opinion that having regard to the nature of the scheme of the policy, the insurance benefits in this case are not deductible both under s. 28A(1)(a) and the common law itself.

[17] It must be noted that in *Ward*'s case, the employer was the
D party who paid for the premium under the contract of employment and even that the damages awarded and received by the plaintiff in *Ward*'s case was not deducted. In the instant appeal before me, the respondent himself purchased the policy and paid for the premiums and by applying the principles as enunciated in *Ward*'s
E case, the respondent is clearly entitled to the insurance monies paid under his own cover of insurance and also the special damages awarded by way of his claim against the appellants.

[18] Similarly, an employee who has contributed under the
F Employee's Social Security Act 1969, can claim the benefits under the said Act and also under the common law at the same time. In *Liew Thai v. Chai Yee Chong* [1997] 1 CLJ Supp 13 the defendant pleaded that by virtue of s. 42 of the Act, the plaintiff was barred from claiming damages. The court held that if the
G plaintiff was entitled to any of the benefits under the Act, then the plaintiff should not be entitled to any other similar benefits under any other written law. Since the plaintiff was claiming under the common law and common law could not be construed as 'any other written law' the plaintiff's claim was allowed.

H **[19]** Furthermore, it is only fair and just that the respondent here should not be penalized for his prudence and foresight in taking out an insurance policy to protect his life, permanent disability or medical expenses as a result of an accident.

I **[20]** In *Judd v. Board of Governors of the Hammersmith, West London and St. Mark's Hospitals & Anor* [1960] 1 All ER 607, it was held that:

... there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him.

[21] In *Tai Siat Fah & Ors v. Lawful Personal Representative of Badrul Hisham bin Hashim* [1995] 2 CLJ 649 my learned brother Abdul Malik Ishak J in allowing the appeal from the sessions court held that:

(1) In interpreting the relevant provisions of the Workmen's Compensation Act 1952 (WCA) and the CLA, the court was constrained to enforce and adhere to the meaning therein, no matter how harsh the result may be, as the statutory language employed was clear and unequivocal.

(2) Applying this rule of interpretation, it was clear that s. 20(a) of the WCA contains no definite injunctive stricture which prohibited the appellant from claiming under the CLA after receiving compensation under WCA. This was unlike the constraints contained in ss. 31 and 42 of the Employees' Social Security Act 1969.

(3) Section 7(3)(i)(d) of the CLA in its plain language provides that any sum which has been paid under any written law relating to any compensation shall not be taken into account in assessing damages.

Hence, it was clear that the compensation paid to the appellant under the WCA would not bar a dependency claim under s. 7 of the CLA, in respect of loss of support and damages for bereavement under s. 7(3A) of the CLA, nor was such compensation deductible.

[22] Hence, the respondent in the present appeal is in as good a position as any other in that s. 28A(1)(a) of the Civil Law Act has made it abundantly clear that any sum paid or payable in respect of personal injury which does not result in death under any contract of assurance or insurance shall not be taken into account in assessing damages.

[23] In addition thereto, I must put on record that the approach or interpretation adopted by the learned counsel for the respondent on the words special damages was more appropriate and the said words must not be restricted only to monies paid out of the pocket of the respondent. As stated earlier, the learned counsel for the respondent explained that nursing care could still

be claimed under the head of special damages where such care has been given by family members or relatives with no financial payment involved at all. In *Marappan & Anor v. Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99, the Supreme Court confirmed that compensation can be given even where the services are provided by parents.

[24] In the circumstances, there is no merit whatsoever on the narrow interpretation urged upon this court by the learned counsel for the appellants on the words "out of pocket" expenses under the head of special damages.

[25] On the question as submitted by the learned counsel for the appellants on the costs of repairs to the vehicle where a plaintiff has purchased a cover of insurance as required by the law, I am of the view that the illustration does not apply to the facts of our present appeal as the insurance policy taken out is essentially a contract of indemnity for repairs to the vehicle. It is claimable by the plaintiff against the insurance company as the defendant if it cites itself as a party. The insurer can off course come in by way of subrogation ie, step into the shoes of their insured.

[26] The decision of the learned sessions judge that the sum of RM37,744.20 was payable by the appellants to the respondent is clearly supported by the provisions in s. 28A(1)(a) of the Civil Law Act 1956 and the decision of the Supreme Court in *Ward*'s case *(supra)* with which decision both the learned session's judge and this court is bound by virtue of the principle of *stare decisis.*

[27] In the midst of writing this judgment I came across the case of *Khairul Sham Ahmad & Anor v. Yesudass Michaelsamy* [2005] 2 CLJ 195. In this case it was held that:

> Hence it is clear that the plaintiff cannot claim for the medical expenses paid by the insurance company because the rights to recover the medical expenses lies in the hand of his insurer. The medical expenses of RM30,000 awarded by the learned Sessions Court Judge has enriched the plaintiff. This enrichment has violated the philosophy behind the principle of compensatory damages upheld in this country. Therefore such an award shall not be allowed. (at p. 199).

[28] With the greatest respect to my learned brother Faiza Tamby Chik J. I cannot agree with his conclusion by virtue of the interpretation of s. 28A(1)(a) of the Civil Law Act 1956 and the decision of the Supreme Court in *Ward*'s case *(supra)*.

[29] Upon perusal of the case of *Khairul Sham Ahmad (supra)* I noted with interest that the learned judge was never referred to s. 28A(1)(a) of the Civil Law Act 1956 nor to *Ward*'s case and I am sure he would arrive at a different decision if the said Act or *Ward*'s case had been referred to him.

[30] In the upshot and for the aforesaid reasons the appeal is dismissed with costs. I must thank both the counsels for the appellants and respondent for their effort and diligence in preparing and presenting their respective arguments before this court.